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Supreme Court of the United States

OCTOBER TERM 1938

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

against

HERBERT A. SMITH, JR.,
Respondent.

BRIEF FOR PETITIONER

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Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 261-266) is reported at 96 Fed. (2d) 98.

Jurisdiction of this Court

A petition for a writ of certiorari was filed July 11, 1938 (R. 272) and was granted by this Court on October 10, 1938 (R. 269). Jurisdiction of this Court is under Section 240 (a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U.S.C.A. Title 28, Section 347).

Statement of the Case

By this writ the petitioner seeks to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, filed April 11, 1938, affirming the judgment of the District Court for the Southern District of New York, entered on the verdict of a jury.

The action was brought by the respondent (plaintiff below) who was employed as an oiler aboard the S.S. Yankee Arrow, owned and operated by the petitioner (defendant below). The respondent sought recovery for personal injuries alleged to have been sustained during such employment by reason of petitioner's negligence (R. 2-5).

The action was brought under the Jones Act,[1] alleging three causes of action. The first cause of action is for compensation for personal injuries caused by alleged negligent failure of the petitioner to provide the respondent with a safe place in which to work (R. 2). The second cause of action was withdrawn at the close of the respondent's case (R. 106). The third cause of action is for maintenance and cure (R. 5).

The petitioner's answer denies generally and pleads as affirmative defenses contributory negligence and assumption of risk (R. 5-7).

At the close of the respondent's case (R. 106), and again at the close of the entire case (R. 231-232), the petitioner moved to dismiss the first and third causes of action. Both motions were denied and the petitioner duly excepted (R. 232).

The Court submitted both causes of action to the jury. Under the first cause of action the Court gave instructions

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[1] Section 33 of the Merchant Marine Act of 1920; U.S.C.A. Title 46 Sec. 688.

as to negligence and contributory negligence (R. 234-240), but refused to give the petitioner's requested instruction on assumption of risk (R. 243). The jury rendered a verdict on the first cause of action for $5,000 and on the third cause of action for $535 (R. 244). The petitioner moved to set aside the verdict and for a new trial, which motions were denied and the petitioner duly excepted (R. 245). Judgment was thereupon entered for the respondent on the verdicts (R. 16-17) and the petitioner appealed to the Circuit Court of Appeals for the Second Circuit (R. 253-254).

The Facts

On June 2, 1935 during the four to eight P. M. watch, the respondent was performing his duties as oiler in the engine room of the petitioner's vessel which was then off the Florida coast on a voyage from Baltimore, Maryland, to Beaumont, Texas (R. 23, 249).

The ship was a modern one, equipped with automatic lubrication (R. 63, 108), and it was a part of the respondent's duties as oiler to feel of the low pressure bearing about every twenty minutes to learn by its temperature whether it was receiving proper lubrication (R. 24). At about 5:30 P. M., and immediately after having felt the low pressure bearing for the purpose stated, the respondent fell to the floor of the engine room and hurt himself. No one saw him fall. The respondent testified that he had climbed up onto a step-plate and a bearing support in order to feel the bearing and that in stepping down again he was caused to fall by tripping over a loose supporting bracket which projected from under the step-plate which was itself loose (R. 25). He said that the step-plate and the bracket had been in this condition to his

knowledge for several weeks (R. 29-30). All of the other witnesses testified that the step-plate was in perfect order and had never had a supporting bracket beneath it (R. 134, 158, 181, 184, 199).

Respondent suffered abrasions on his back and left index finger (R. 249-251). He had no fractures (R. 19). There was a sharp conflict in the evidence as to the extent of his incapacity resulting from these injuries (R. 238).

The respondent testified that he always used the step-plate in feeling the low presure bearing and that he could not reach the bearing while standing on the floor-plates (R. 62-63). This testimony was not corroborated. All of the other witnesses testified that the step-plate was not intended for use while the vessel was at sea or the engines in operation and that to use it under such conditions was extremely dangerous (R. 194). They testified that the step-plate was intended for use when the vessel was in port and the engines not in operation in order to reach overhead in taking down and repairing the engines (R. 146, 157, 192, 199).

Witnesses called by the petitioner testified without contradiction that the proper, usual and safe method of feeling the low pressure bearing was to stand on the floor-plates, grasp with the right hand a hand-rail, or grab-iron, provided for the purpose and touch the end of the bearing with the fingers of the left hand (R. 147, 157, 187, 198).

The respondent testified that if he grasped the grab-iron with his right hand he could not reach the bearing with his left (R. 31), although it was undisputed that the respondent had a reach of 61 inches (R. 53-54) and the distance from the grab-iron to the bearing was 43½ inches, there being no obstructions between (R. 198, 248).

The respondent was working under general orders (R. 13, 24). No specific instructions were given to the oilers on the petitioner's vessel, but the engineer in charge of the watch would observe the manner in which the oiler did his work and correct him if he did anything improperly (R. 187, 189). The third engineer who was in charge of the respondent's watch testified that he had observed the respondent feel the low pressure bearing and that the respondent always did it while standing on the floor-plates (R. 187, 190).

The respondent was an experienced oiler and had felt this particular bearing a great many times (R. 21, 24, 53, 65). It is his contention that he stood with his right foot on the loose step-plate, his left foot on the bearing support, which was about a foot forward of the step-plate and about a foot higher, held on to the slush-pan with his left hand, which would then have been about knee-high, to his left and opposite his right foot, and then reached forward with his right hand to feel the bearing which would then have been about a foot forward of his left foot, and somewhat below it (R. 27, 201, 247, 248).

The respondent was thus balanced precariously on a loose step-plate, with moving machinery below him on both sides (R. 247).

The petitioner could not anticipate that respondent, who was an experienced oiler, would occupy such an awkward and hazardous position in doing his work while the vessel was at sea and the engines in operation.

No representative of the petitioner ever saw the respondent or any other seaman occupy such a position under such circumstances (R. 187).

Petitioner's Contention Below

It was the petitioner's contention that the respondent should have felt the bearing in the usual manner while standing on the floor-plates and holding on to the grab-iron, which provided him with a safe place in which to do his work, and that when he voluntarily abandoned this safe place and climbed up on the step-plate and bearing support, which under the circumstances was a very dangerous place, he assumed the risks involved in that choice, one of which was the risk of falling over the defective brace, which he says he had known was defective for a period of weeks.

The Rulings Below

The petitioner sought to have this issue submitted to the jury by asking the District Court to charge the jury that, if they believed that the respondent could have felt the bearing while standing with both of his feet on the floor and that it was not necessary for him to climb up on the step-plate, he assumed the risk of the injury he sustained. The District Court refused so to charge (R. 243). The point was also raised by motion to dismiss the first cause of action, which motion was denied (R. 231-232).

The Circuit Court of Appeals, after pointing out that, "This point was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances" (R. 263), affirmed the judgment below (R. 266). The Court recognized previous holdings to the effect that a seaman who has a choice between an obviously safe and an obviously unsafe place in which to work and voluntarily selects the latter assumes the risk incident to

that choice. The Court held, however, that the decisions of this Court in the *Arizona*[1] and *Beadle*[2] cases required a reversal of this ruling (R. 265).

Petitioner's Contention on this Appeal

It is the petitioner's contention on this appeal that by the decisions referred to this Court merely clarified and affirmed the rule previously established in most of the lower Federal courts that a seaman who has no real choice to use or refuse to use the equipment or working place provided for him at sea can not be held to assume the risk merely because the unseaworthiness or defective condition is known to him.

It is the petitioner's contention, further, that this rule, based as it is on the seaman's lack of any real choice, should not apply to a situation where the seaman does have a choice and voluntarily selects the dangerous working place. In the latter case, the established rules of assumption of risk should apply.

The Assigned Errors to be Urged

The petitioner respectfully urges that the Circuit Court of Appeals erred in sustaining the refusal of the trial court to dismiss the first cause of action or to submit the issue of assumption of risk to the jury under proper instructions and in affirming the judgment of the District Court. On appeal to the Circuit Court of Appeals, the petitioner specifically assigned as error the District

[1] *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 80 L. Ed. 1075.
[2] *Beadle* v. *Spencer* (1936), 298 U. S. 124, 80 L. Ed. 1082.

Court's refusal to dismiss the first cause of action on the ground of assumption of risk and the District Court's refusal to charge as requested on the issue of assumption of risk (Assignments 1, 2, 5 and 18b, R. 254, 259).

Summary of Argument

I. The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled (*post*, pp. 10-17).

(a) A seaman assumes the risks normally incident to his calling.

(b) Because of the necessarily rigid discipline of the sea and the absence of any real choice to use or refuse to use the only equipment or working place available to him, a seaman does not assume the risk of an unseaworthy ship or negligently defective equipment, even though such condition is known to him.

(c) Where, however, the seaman voluntarily abandons the safe for the unsafe equipment or working place, he assumes the risk incident to such choice.

II. The *Arizona* and *Beadle* cases in no way modified the rules as above stated (*post*, pp. 18-20).

(a) Those cases involved no choice on the part of the seaman.

(b) The opinions did not discuss the cases establishing the "choice" rule.

(c) The opinions show no intention to reverse the rules of assumption of risk theretofore generally applicable.

(d) The Circuit Court of Appeals for the Fifth Circuit did not so interpret the opinions.

III. The opinion below, in stating that "a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice" would create a new rule of law contrary to the uniform prior holdings (*post*, pp. 20-22).

IV. Improper denial of the defense of assumption of risk is not cured by a correct instruction on contributory negligence (*post*, p. 23).

V. The law is and should remain that the seaman assumes the risks that he takes unnecessarily and as a matter of his own free choice (*post*, pp. 24-25).

(a) The law should require a ship-owner to exercise every precaution to provide a seaworthy ship and safe equipment. The law should also require a seaman to take every reasonable precaution for his own safety.

(b) The law should discourage the well-known tendency of seamen to take unnecessary risks.

1. through disregard for their own safety,
2. to save time or effort, or
3. to show contempt for safety devices.

POINT I.

The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled.

It has always been held that the seaman assumes such risks as are normally incident to his perilous calling. This was so before the Jones Act and the rule was not changed by the passage of that statute.[1]

While authorities have differed in exact definition of assumption of risk, and particularly in distinguishing it from contributory negligence, it is fundamental that assumption of risk must be voluntary.

It has been said:

> "* * * a risk must be voluntarily assumed to relieve the master from liability. Risks incurred under coercion are not assumed. * * *. If, therefore, he continues to incur the risk of such defects, under any kind of necessity or coercion, he does not voluntarily assume the risk, and is not necessarily debarred from recovery thereby."[2]

A master of a vessel at sea has necessarily drastic powers to enforce discipline on his ship. To compel obedience he may inflict corporal punishment or imprison or confine the seaman.[3]

Unlike a servant on land, therefore, a seaman who is ordered to use defective equipment or whose general orders require such use has no real choice in the matter

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[1] *The Arizona* v. *Anelich, supra.*

[2] *Shearman & Redfield on Negligence,* Vol. I (6 ed.), Sections 207(h) and 211(a).

[3] *Panama R. Co.* v. *Johnson* (C.C.A. 2nd, 1923), 289 Fed. 964. Affirmed (1924) 264 U. S. 375, 68 L. Ed. 748.

and can not be said to assume the risk incident to the defect merely because he knows of it.

This is "but another application of the principle that a man does not assume a risk forced upon him . . . the element of coercion . . . is the basis of the modification of the common-law rule as found in maritime law."[1]

In the *Arizona* case, *supra*, this Court, after a complete review of the authorities in cases where the seaman, in carrying out direct or general orders, necessarily used defective equipment, held that in such a case the defense of assumption of risk is not available.

This Court pointed out that this was the conclusion reached generally by the lower Federal courts, both before and after the passage of the Jones Act.

Where, however, conditions on board ship are such that the seaman has complete freedom of choice to take or avoid an obvious and known risk, there is every reason for the application of the principle of assumption of risk.

Such is the case where the seaman has alternative routes or pieces of equipment, one of which he knows to be safe and the other he knows to be unsafe; or where the seaman voluntarily abandons a safe and proper working place and selects, for some reason of his own, an unusual and obviously unsafe working place, which selection the ship-owner could in no way anticipate.

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[1] See *Holm* v. *Cities Service Transp. Co.* (C.C.A. 2nd, 1932), 60 Fed. (2d) 721, 723, and *State S.S. Co.* v. *Berglann* (C.C.A. 9th, 1930), 41 F. (2d) 456, cert. den. (1930), 282 U. S. 868, 75 L. Ed. 767, where the Court says, "The doctrine of assumption of risk has long been applied to the cases of seamen; its application has been made with reference to the peculiar nature of the seaman's employment, his subjection to orders, and inability to abandon his employment during a voyage."

A number of Federal courts over a period of years have recognized this situation and ruled that in such a case the seaman does assume the risks which he incurred voluntarily and not under the compulsion of either direct or general orders.

The Circuit Court of Appeals for the Second Circuit had such a case before it in *Holm* v. *Cities Service Transp. Co.*[1] In that case plaintiff was employed as third mate on a tank-vessel which at the time involved was loading oil in a foreign port. While plaintiff was in charge of the loading operations various leaks occurred, resulting in pools of oil on the deck. This was usual and to be expected. Plaintiff went off watch and a few hours later went aft by way of the flying bridge to get a drink of water. Returning by the shorter route, along the deck, he stepped in one of the pools of oil, fell and was hurt. Plaintiff sued under the Jones Act, recovered a judgment and the defendant took an appeal.

The Circuit Court of Appeals felt that the jury had properly found defendant guilty of negligence in failing to remove the oil which accumulated on the deck during the loading. Since, however, plaintiff had reason to believe that there was oil on the deck and voluntarily selected the shorter though more dangerous return route, the Court felt that assumption of risk should be a defense if that defense is ever available in a Jones Act case.

The Court's analysis of the principles involved, leading to the conclusion that the defense was available on the facts stated, was as follows:

> "Where a seaman is injured when acting under orders, he does not assume the risk • • • his

[1] *Supra.*

> duty to obey the order of a superior is so compelling that a rule of law based on the maxim 'volenti non fit injuria' can not be applied. Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land. * * *
>
> "That a seaman does not assume the risk of injury caused by the unseaworthiness of the ship or defective appliances, even though known to him, * * * is not decisive in this case. Of course, seamen on duty must use what is furnished for their use because they can not quit, and ship-owners can not relieve themselves of liability to their seamen for injuries caused by the unseaworthiness of their ships or defective appliances which they require seamen with no real choice in the matter to use. But this doctrine is not to be pressed to the point where a seaman not acting under orders is relieved of the risks incident to his employment which are known and obvious to him."

The same court had the point up again in *Johnson* v. *United States*.[1] This was a libel in admiralty to recover damages for the death of a seaman who had been swept overboard during heavy weather in the Indian Ocean. The deceased, with several other seamen, was crossing the after well-deck on his way to supper when a wave washed across the deck and carried him overboard. He was subsequently rescued, but died of the injuries he received.

There was an alternative route available through a shaft alley below deck. The crew had been given general

[1] (C.C.A. 2nd, 1935), 74 Fed. (2d) 703.

admonitions not to go over the exposed deck during rough weather but instead to use the shaft alley.

The trial court held the respondent guilty of negligence in failing to rig life-lines on the well-deck, but halved the damages because it found the decedent negligent in choosing a path which was obviously fraught with danger when there was another means available to him of which he knew.

The Circuit Court of Appeals reversed the decree and dismissed the libel on the ground that the deceased seaman by his voluntary selection of the route he knew to be dangerous assumed the risk. The Court said:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation. To find him negligent in crossing the well-deck, as the trial judge did, and at the same time to hold that he did not assume the risk of such an obviously unsafe passage, was quite contrary to the whole doctrine of assumption of risk applicable to such cases and explained in our recent decision[1] • • • where the very question we have here arose."

In *Scheffler* v. *Moran Towing and Transportation Co.*[2] the libelant was a cook, employed on one of respondent's harbor tugs. The libelant was a day-time employee only and, when necessary, served in the double capacity of cook and deck-hand. On the day in question, the tug was short handed, as the libelant knew when he went on board in

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[1] *Holm* v. *Cities Service Transp. Co., supra.*

[2] (C.C.A. 2nd 1933), 68 Fed. (2d) 11.

the morning, and the libelant was called upon to tend certain lines when the tug went to pick up some scows. In the course of this operation he got his leg caught in the bight of a towing strap and was injured. The District Court found that the shorthandedness of the tug rendered her unseaworthy and, accordingly, entered a decree for the libelant.

The Circuit Court of Appeals reversed the decree because the libelant assumed the risk of the tug's shorthandedness. The Court put this on two grounds: first, that the defense is available where a seaman has an alternative and, second, that libelant being a day-time employee[1], the defense was available in his case in any event. On the first point, the Court stated the law as follows:

> "It is indeed true in general that a seaman at sea does not assume the risk of any unseaworthiness, though it be known to him when he embarks. * * * This does not however excuse him when he has an alternative * * *."

The Circuit Court of Appeals for the Ninth Circuit in 1930 had before it a case[2] where a seaman had been killed by falling from a beam on which he was standing while attempting to free a timber being hoisted from the hold. Suit had been brought alleging negligence in the installation and maintenance of the beam.

The Court in affirming the holding of the District Court that there was no liability, used the following language:[3]

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[1] See also *Skolar* v. *Lehigh Valley R. Co.* (C.C.A. 2nd, 1932), 60 Fed. (2d) 893.

[2] *Hunt* v. *Hobbs, Wall & Co.* (C.C.A. 9th, 1930), 42 Fed. (2nd) 437.

[3] At page 438.

> "The Proctors have shown commendable industry and zeal in marshaling the authorities on the subject of assumption of risk, seaworthiness, negligence, etc., but, after all is said and done, the simple fact remains that this beam was not intended as a place to work, its situation was obvious, its dangers, such as they were, clearly manifest; the decedent was neither directed to use the beam nor did his duties necessarily require him to do so. If he had taken a half hitch of the bight of the rope around one end of the timber they were raising, or bent the rope nearer the end, it would have been entirely unnecessary to use the beam to free the timber. * * * Such risk as was involved in the use of the beam by the decedent was unnecessary and upon well established principles was assumed by him."

In the Fifth Circuit the point was recently discussed in *Tampa Interocean S. S. Co.* v. *Jorgensen*[1]. In that case the Circuit Court of Appeals affirmed the judgment of the District Court in favor of the injured seaman. There was evidence that the seaman had an alternative between a safe and an unsafe route, but it also appeared that he did not know either that there was an alternative or that the way he chose was unsafe. It further appeared that the way he chose was the usual and natural route and that he really made no choice. The District Court had submitted the issue to the jury in the following language:

> "You are instructed that if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

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[1] (C.C.A. 5th, 1938), 93 Fed. 2nd, 927. Cert. denied May 2, 1938, 82 L. Ed. 860, 58 S. C. 949.

The Circuit Court of Appeals (Fifth Circuit) after discussing the *Arizona* and *Beadle*[1] cases ruled that under the circumstances the District Court's charge correctly stated the law.

Petitioner has found no case other than the decision now appealed from contrary to the principles so clearly established by the opinions referred to in the Second, Fifth and Ninth Circuits.

The application of these principles to the case at bar seems clear. Paraphrasing the language of the Circuit Court of Appeals for the Ninth Circuit[2], there was evidence on which the jury in our case might have found

> "• • • that this *step-plate* was not intended as a place to work, its situation was obvious, its dangers, such as they were, clearly manifest; the *respondent* was neither directed to use the *step-plate* nor did his duty necessarily require him to do so."

Whereupon the Court should have held (again paraphrasing) that:

> "• • • Such risk as was involved in the use of the *step-plate* was unnecessary and upon well established principles was assumed by him."

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[1] *Supra.*

[2] *Hunt* v. *Hobbs, Wall & Co., supra.*

POINT II

The *Arizona* and *Beadle* cases in no way modify the rules as above stated.

In the *Arizona* case[1], the seaman had been injured at sea while engaged in hauling in with a power-winch the purse line of a fishing net. In some manner his leg became entangled in the purse line, and, before the winch could be stopped, his leg was drawn on to the drum and he received injuries which resulted in his death.

It was claimed that, through defendant's negligence, a clutch was defective, making it impossible to stop the engine in time to avoid the injury.

The trial court refused to charge that voluntary assumption of risk by decedent was a defense. There was no suggestion that decedent had any alternative or that it was not necessary in performing his duties to use the defective equipment provided for him.

In the *Beadle* case[2], the seaman was injured by a fall into an open hatch while engaged in unloading lumber from the deck. In performing this work, he had been standing on a pile of boards. There was evidence that these boards were, through negligence, piled in such an unstable way in proximity to the open hatch as to provide an unsafe place for the seaman to work.

The petitioner had requested a charge that if the jury should find that respondent, in placing the sling underneath the lumber, "chose to perform the act in a dangerous manner, such as stepping too near the edge of the deck load when there was a safe method of doing the

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[1] *Supra.*
[2] *Supra.*

work involving no risk of the edge of the deck load giving away, then the plaintiff can not recover". However, this Court pointed out, in upholding the denial of that request to charge, that, "There is no suggestion in the evidence or by petitioner's requests that he could have stood elsewhere when performing that operation, or that he had any choice but to do his work there or leave the vessel."

In neither the *Arizona* nor the *Beadle* case did this Court in its opinion refer to the cases discussed *supra* establishing the rule where the seaman, of his own free choice, takes an unnecessary risk.

In none of the cases cited and discussed in the opinions which deny the defense of assumption of risk has such a factual situation been found.

Nothing in either opinion justifies the conclusion that this Court intended to reverse the rule so clearly developed in the "choice" cases. The conclusion that assumption of risk is not a defense in cases of the type this Court was considering is based clearly on the principles quite generally established in the lower courts. These, in turn, were based on the fundamental principle that assumption of risk must be voluntary, and that the denial of that defense in maritime cases is coextensive with the absence of free choice and the presence of coercion in these cases.

The Fifth Circuit Court of Appeals in the *Jorgensen* case[1], evidently found nothing in the *Arizona* or *Beadle* opinions to alter the application of the "choice" rule which the lower court in that case had so clearly stated to the jury.

The Court, after stating the applicable principles of law established by the *Arizona, Beadle* and other cases,

[1] *Supra.*

said that the lower court had "charged fully the law as we have stated it."

The Court had particular reference to the lower court's instruction already quoted[1] that

> "* * * if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and if the plaintiff knew the safe method and notwithstanding chose the unsafe method the defendant is not liable."

POINT III

The opinion below creates a new rule of law contrary to the uniform prior holdings.

The Court below cites no authority *extra* the *Arizona* and *Beadle* opinions which is claimed directly or by analogy to justify the rule announced.

As previously pointed out, the petitioner has found no prior case which questions the authority or the soundness of the "choice" rule.

The Court below states its conclusion as follows:

> "In view of what the Supreme Court has said[2] and the growing tendency to limit the defense of assumption of risk, and when indemnity is allowed, to apportion damages according to fault rather than to bar them altogether, we feel confident that a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice" (R. 265).

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[1] *Supra*, p. 16.

[2] In the *Arizona* and *Beadle* opinions, *supra*.

If by "a careless choice" the Court means negligence, the statement is correct but does not justify the decision in this case. To make the language applicable, it should be not "a careless choice" but *"a voluntary and deliberate choice involving a known danger."*

A sailor must always "weigh alternatives" to the extent of deciding whether he shall abandon the safe and proper working place the ship provides in favor of some unusual and obviously dangerous working place. If the jury find, on proper instructions, that the selection was voluntary and the risk obvious and known then it should not shock the Court that the sailor by making such "a careless choice" loses any right to recover from the master for the resulting injury.[1]

While the Court below stresses that the language in the *Arizona* and *Beadle* opinions is "general and sweeping", in precluding assumption of risk as a defense in this type of action, it is not suggested that that defense is entirely eliminated.

It is clear that a seaman does assume the risks normally incident to his perilous calling. Furthermore, the Court below said:

> "We do not, however, suggest that a seaman who uses a defective appliance or chooses an unsafe place to work, contrary to orders, could recover indemnity from his employer on any theory, and our decision in *Johnson* v. *United States* * * * may be sustained because the seaman there was given orders not to go to his mess-room over an exposed deck but to take a shaft tunnel in rough weather" (R. 265).

By referring to the opinion in the *Johnson* case, it appears that the "orders" referred to amounted merely to

[1] See footnote 3, *post*, p. 24.

"general admonitions" to the crew that the open deck was dangerous and the shaft tunnel should be used in rough weather.

In any event, the distinction appears unsound. The significance of the "general admonitions" was in establishing (1) that the seaman knew of the risk and (2) that he was not coerced into incurring it but did so voluntarily.[1]

Where these two elements are present there is every reason for allowing the defense of assumption of risk. No authority has been found for limiting it to situations where the seaman actually disobeys orders.

Where the servant is ignorant of the danger there may be a "duty to warn". This is for the purpose of apprising him of the danger and is not applicable where, as here, he is affirmatively shown to already appreciate the danger.[2]

No authority can be found for extending the duty to warn a servant of a risk to a duty to forbid him to incur it.[3]

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[1] *Johnson* v. *United States, supra,* at p. 704.

[2] "The duty of cautioning a servant rests upon the master only in case he is informed or has reason to believe that the servant is inexperienced and ignorant of the probable dangers he is about to encounter." *King* v. *Morgan* (C.C.A. 8th, 1901), 109 Fed. 446, 449.

[3] Although proof that he was forbidden may be the best evidence that he knew of the danger and voluntarily incurred it.

POINT IV

Improper denial of the defense of assumption of risk is not cured by a correct instruction on contributory negligence.

The Courts have had difficulty in exact distinctions between assumption of risk and contributory negligence. While the distinction might be difficult in border-line cases, it is clear that assumption of risk covers situations not included in any definition of contributory negligence. A seaman might, for instance, proceed with extraordinary care along a route which he knew to be inherently dangerous. He might suffer injury through no want of care from a risk he fully appreciated and voluntarily incurred. The distinction is particularly important where, as here, contributory negligence merely serves to mitigate the damages, while assumption of risk may be a complete defense.[1]

It has been said[2] that

> "* * * Whenever discrimination between them became necessary, the use of defective ways or works with notice of the defect and appreciation of the danger was held to be assumption of the risk and not contributory negligence."

As pointed out *supra* (p. 14), the Circuit Court of Appeals for the Second Circuit in the *Johnson* case reversed the District Court which had treated as contributory negligence only the voluntary selection of a route known to be dangerous.

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[1] *Seaboard Air Line R. Co.* v. *Horton* (1916), 239 U. S. 595, 601, 60 L. Ed. 458.

[2] *Yaconi* v. *Brady & Gioe, Inc.* (1927), 246 N. Y. 300, 306 (opinion by Judge Cardozo). See also *Seaboard Air Line R. Co.* v. *Horton* (1914), 233 U. S. 492, 504, 58 L. Ed. 1062; *Pryor* v. *Williams* (1920), 254 U. S. 43, 65 L. Ed. 120.

POINT V

The law is and should remain that the seaman assumes the risks that he takes unnecessarily and as a matter of his own free choice.

Rules of law should be designed to protect a seaman from injury.

The law should require a ship-owner to exercise every precaution to provide a seaworthy ship and safe equipment. The law should also require a seaman to take every reasonable precaution for his own safety.

No proper purpose is served by encouraging a seaman to take obvious risks not necessary in the performance of his duties.[1]

Seamen have a known tendeney to take such risks through a disregard for their own welfare, in order to save time or effort, or even affirmatively to show a contempt for safety devices provided for them.[2]

No rule has been found in any field of law which justifies a recovery in such a case.[3] To apply such a rule is to encourage unnecessary accidents.

Assumption of risk may well be termed a harsh rule where economic or other factors raise a doubt as to the servant's real freedom to choose. Such is not the case

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[1] *See Shearman & Redfield on Negligence* (6th Ed. 1913), Vol. I, p. 556.

[2] Cf. Bohlen, *Voluntary Assumption of Risk*, 20 Harvard Law Review 91 at 115.

[3] "It would seem to be an axiomatic rule of justice that a man should not be permitted to act voluntarily to his own detriment and then to put the burden of his folly upon another." *Assumption of Risk as a Defense where the Negligence is a Breach of a Statutory Duty*, 26 Harvard Law Review 262, 263.

where he makes a free choice between alternative working places.

The seaman, in any event, is entitled to maintenance and cure. To place on an industry a further burden of compensating for such injuries means placing that burden to some extent on the employees in the industry, including those who exercise proper care to avoid unnecessary risks.

No seaman will be denied recovery unless the Court, whose ward he is, or the jury, whose sympathy he invariably has, is satisfied that he voluntarily incurred a wholly unnecessary risk.

Conclusion

The petitioner submits that it was entitled to have the first cause of action dismissed or at least to have the jury determine whether the respondent voluntarily incurred a wholly unnecessary risk, and that the decision of the Circuit Court of Appeals is wrong and should be reversed.

Respectfully submitted,

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